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In the Supreme Court of the United States

OCTOBER TERM, 1969

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CLARK'S GAMBLE CORPORATION d/b/a CLARK'S DISCOUNT DEPARTMENT STORE, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

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v.

CLARK'S GAMBLE CORPORATION d/b/a CLARK'S DISCOUNT DEPARTMENT STORE, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case insofar as it denied enforcement of the Board's bargaining order.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 13-17) is reported at 407 F. 2d 199. The decision and order of the Board (App. C, *infra*, pp. 20-62) are reported at 168 NLRB No. 43.

JURISDICTION

The decree of the court of appeals (App. B, *infra*, p. 18) was entered on February 11, 1969. The Board's timely petition for rehearing *en banc* was denied on March 26, 1969 (App. B, *infra*, p. 19). On June 16, 1969, Mr. Justice Stewart granted an extension of time for filing the petition to and including August 8, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether enforcement may be refused to an otherwise appropriate bargaining order of the National Labor Relations Board on the ground that the union in whose favor the order ran may have lost its majority status during the time between the commission of the employer's unfair labor practices and the Board's decision.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).
>
> * * * *

Sec. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action * * * as will effectuate the policies of the Act: * * *.

STATEMENT

A. The Board's Findings of Fact

On December 22, 1964, Local 1262, Retail Clerks International Association, AFL-CIO, having obtained 52 authorization cards from the 77 employees at the Company's Glens Falls store,[1] sent a telegram to the Company. It claimed to represent a majority of the employees at the Glens Falls and Saratoga Springs stores, offered to produce the cards for checking by an impartial party, and asked for recognition and bargaining (App. C, *infra*, pp. 26-36; J.A. 49a, 57a). On the same day the Company replied that it had no way of knowing whether the Union enjoyed

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[1] The Company operates discount department stores at several locations, including Glens Falls and Saratoga Springs, New York (App. C, *infra*, p. 47, n. 15; J.A. 27a, n. 15). The cards authorized the Union to represent the employees for collective bargaining purposes (App. C, *infra*, p. 35; J.A. 56a, 253a). ("J.A." refers to the joint appendix in the court of appeals, a copy of which has been filed with the Clerk.)

majority status and suggested that it seek a Board representation election. One month later, the Company filed a petition for a Board election; the Board's Regional Director dismissed that petition after issuing the complaint herein (App. C, *infra*, pp. 47-48; J.A. 27a).

During the Union's organizing campaign at Glens Falls and following its request for recognition and bargaining, the Company engaged in pervasive anti-union activities. Thus, in early December 1964, store manager Dunne instructed store guards Godfrey, Williams, and Osborne, who were also members of the local police force, to "keep an eye" on the union organizers and make sure they did not disturb employees during working time (App. C, *infra*, pp. 25, 50; J.A. 46a, 30a, 100a, 138a, 140a, 237a). On December 10, employees who were entering a hall to attend a union meeting, saw Williams standing nearby and shaking his head at them in a negative fashion. Two hours later, Williams was still standing there; together with Godfrey, he watched the employees as they left the union meeting (App. C, *infra*, p. 23; J.A. 30a, 190a-191a).

During the same month Godfrey told some employees in conversation that they did not need a union, and suggested that they could get better working conditions if they approached the store manager as a group, without a union (App. C, *infra*, pp. 23-24; J.A. 47a, 31a, 148a, 150a, 162a-163a, 191a-193a). About the same time, Williams warned an employee whom he had noticed having a conversation with two

union organizers that: "You will get into trouble if you are caught talking with members of the Union." Williams added that Manager Dunne had stated that employees seen talking to union people would be fired (App. C, *infra*, pp. 51-52; J.A. 31a, 177a, 178a-179a). Just prior to Christmas, Godfrey asked an employee to give him a list of the girls who had signed union cards, adding that Dunne had the names of those who had already signed (App. C, *infra*, p. 52; J.A. 31a, 164a-165a, 170a-173a). In late December, Williams told an employee that if the Union came in "things will tighten up" (App. C, *infra*, p. 51; J.A. 31a, 239a). After observing employee Noonan hand a signed authorization card to a union organizer, Godfrey immediately informed Manager Dunne; the two immediately went to Noonan's counter and ordered him to accompany them to a Justice of the Peace to make a statement as to what had occurred. Noonan, who appeared frightened, went with them and gave the statement (App. C, *infra*, pp. 48-49; J.A. 28a-29a, 100a-102a, 143a-146a).

Reinack, a management-trainee,[2] asked an employee in December whether she had attended a union meeting on the previous evening and warned her that signing a union card would jeopardize her job (App. C, *infra*, p. 53; J.A. 32a, 182a). In January 1965, another management-trainee, Clark, told an employee that a "big lay-off" was in prospect but that she

[2] The Board found that the "management-trainees" were "department heads" and thus supervisors within the meaning of the Act (App. C, *infra*, pp. 54-55; J.A. 33a).

would not be laid off as long as she minded her "own business" and stayed "out of trouble." When the employee asked Clark if this was a threat, he denied that it was, but asked, "What are you going to do, run to the Union?" (App. C, *infra*, p. 24; J.A. 48a, 32a, 174a-175a). In mid-January, two union organizers visited an employee at the store during the latter's coffee break. Shortly afterward, the assistant store manager told the employee not to talk to union organizers (App. C, *infra*, pp. 49-50; J.A. 29a, 205a-206a, 208a). Late that month, Supervisor Montero interrogated an employee as to whether "anyone from the Union had been around recently" (App. C, *infra*, p. 25; J.A. 48a, 32a, 176a-177a).

B. The Board's Conclusions and Order

On the foregoing facts, the Board found that the Company had violated Section 8(a)(1) of the Act by engaging in surveillance of a union meeting; intimidating an employee for conversing with union organizers; directing employees not to talk to organizers; warning employees that it had a list of those who had signed cards; interrogating employees as to their union activity; threatening the employees with onerous working conditions or job loss if the Union were selected; and suggesting that the employees deal with the Company directly rather than through a union (App. C, *infra*, pp. 22-26, 57; J.A. 46a-49a, 40a-41a). In addition, the Board found that when the Union demanded recognition and bargaining in December it had valid authorization cards from a ma-

jority of the employees at the Company's Glens Falls store; that the Glens Falls store constituted an appropriate unit for collective bargaining purposes;[3] and that the Company's violations of Section 8(a)(1) were of a kind calculated to dissipate the Union's majority status and to preclude the holding of a fair representation election. Accordingly, the Board concluded that, "in order to remedy the unfair labor practices committed and to restore the *status quo ante*," it was necessary not only to enter a cease and desist order, but also to require the Company, on request and as a remedy for the violations of Section 8(a)(1),[4] to bargain with the Union as the representative of the employees at the Glens Falls store. (App. C, *infra*, pp. 36-37, 38-40; J.A. 57a-58a, 59a-61a.)

C. The Decision of the Court of Appeals

The court of appeals sustained the Board's findings that the Company had violated Section 8(a)(1) of the Act; left undisturbed its further finding that the Union represented a majority of the employees in an appropriate unit, the Glens Falls store, when it requested recognition and bargaining on December

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[3] The Board found that the Glens Falls-Saratoga Springs unit in which the Union first sought recognition was inappropriate, because the two stores were "unrelated in any significant respect" (App. C, *infra*, p. 27; J.A. 50a).

[4] The Trial Examiner, had found, contrary to the Board, that the Company had not engaged in unlawful surveillance; he concluded that the remaining violations of Section 8(a)(1) of the Act were too isolated to warrant a bargaining order (App. C, *infra*, pp. 56-57; J.A. 30a-31a, 35a).

22, 1964; and enforced the cease and desist provisions of the Board's order. However, the Court refused to enforce the bargaining provision. Noting that the Union's majority status had been established as of December 22, 1964, that the Board's bargaining order did not issue until November 1967, and that the record showed that changes in personnel at the Glens Falls store were frequent, the court concluded that it could "not with justification assume that the majority status persists which existed years ago" (App. A, *infra*, pp. 15-16). The court added that "our apprehension on this score is hardly abated by the fact that the 1964 majority determination was made on the basis of authorization cards, 'a notoriously unreliable method of determining the majority status of a union'" (App. A, *infra*, p. 16). Accordingly, the court remanded the case to the Board "for a determination as to whether in view of the passage of time since entering its Order that portion thereof requiring [the Company] to bargain collectively with [the Union] is still appropriate." Specifically, the court directed the Board "to determine the extent to which there has been a change in the identity of the employees since the time demand for recognition was made" and, if "such change is found to have been substantial," to "cause a representation election to be conducted" (App. A, *infra*, pp. 16-17).

REASONS FOR GRANTING THE WRIT

The refusal of the court of appeals to enforce the Board's bargaining order rests upon considerations

which this Court recently rejected in *National Labor Relations Board* v. *Gissel Packing Co., et al.*, Nos. 573, 691, 585, O.T., 1968, decided June 16, 1969. Accordingly, corrective action by this Court is warranted.

The Board found that the Company engaged in violations of Section 8(a)(1) of the Act which were "of a kind calculated to dissipate the Union's majority status, and to destroy the conditions for a free and fair election," and which were so extensive as to require a bargaining order as a remedy (App. C, *infra*, pp. 36-37; J.A. 57a-58a). The Sixth Circuit sustained the Board's unfair labor practice findings, but nonetheless declined to enforce the bargaining order for the reasons: (1) the Union's majority status was established "on the basis of authorization cards, 'a notoriously unreliable method of determining the majority status of a union'" (App. A, *infra*, p. 16); and (2) since three years had elapsed between the time the Union secured its authorization cards and the time the Board issued its bargaining order, and since changes in store personnel were frequent, it could not be assumed that "the majority status persists which existed years ago" (App. A, *infra*, p. 16).

However, in *Gissel*, *supra*, this Court specifically rejected the contention that "authorization cards are such inherently unreliable indicators of employee desires that * * * the cards themselves may never be used to determine a union's majority and to support an order to bargain" (sl. op., p. 23). While acknowl-

edging the "superiority of the election process," the Court pointed out that "where an employer engages in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice" (sl. op., p. 25).[5]

Insofar as the Sixth Circuit's refusal to enforce the bargaining order was based on the lapse of time and the intervening employee turnover, *Gissel* also makes plain that these factors do not justify its action. As the Court stated in *Gissel* (sl. op., p. 32):

> We have long held that the Board is not limited to a cease-and-desist order in such cases [*i.e.*, where the employer's unfair labor practices have made the holding of a fair election unlikely], but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status. See *NLRB* v. *Katz*, 369 U.S. 736, 748, n. 16 (1962); *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512 (1942). And we have held that the Board has the same authority even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered. *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1943). We see no reason now to withdraw this authority from the Board. * * *

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[5] The Court added that, "in any specific case of alleged irregularity in the solicitation of the cards, the proper course is to apply the Board's customary standards * * * and rule there was no majority if the standards were not satisfied" (sl. op., p. 25). The Board here found, and the court below did not disturb its finding, that there were no solicitation irregularities (App. C, *infra*, pp. 35-36; J.A. 57a).

CONCLUSION

For the foregoing reasons, and since the Board has made an adequate finding to support the bargaining order in this case,[6] we believe that the case is an appropriate one for summary reversal. See *National Labor Relations Board* v. *Int'l Union, Progressive Mine Workers*, 375 U.S. 396, summarily reversing, 319 F. 2d 428 (C.A. 7). Accordingly, the Court should grant the petition for a writ of certiorari, reverse the judgment of the court of appeals insofar as it denies enforcement of the Board's bar-

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[6] In *Sinclair Co.* v. *National Labor Relations Board*, No. 585, O.T., 1968, one of the cases consolidated with *Gissel*, the Board, as here, found "that the employer's threats of reprisal were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats." *Gissel, supra*, sl. op., p. 37. The Court considered this finding sufficient to justify affirmance of the action of the court of appeals enforcing the Board's bargaining order. The situation here is thus distinguishable from that in *Atlas Engine Works, Inc.* v. *National Labor Relations Board*, No. 598, O.T., 1968, decided June 23, 1969, and three companion cases, Nos. 906, 1213, and 1273, where the Court vacated the judgments and ordered that the cases be remanded to the Board for further consideration in the light of *Gissel*. In those cases, the bargaining order was prescribed as a remedy for the violation of Section 8(a)(5), and, because its "current practice at the time required it to phrase its findings in terms of an employer's good- or bad-faith doubts" (*Gissel*, sl. op., p. 38), the Board had failed to make the requisite findings concerning the impact of the unfair labor practices on the election process.

gaining order, and remand the case to that court with directions to enforce that order.

Respectfully submitted.

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AUGUST 1969.

APPENDIX A

No. 18354

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLARK'S GAMBLE CORPORATION d/b/a CLARK'S DISCOUNT DEPARTMENT STORE AND M. N. LANDAU STORES, INC., d/b/a CLARK'S STORES, PETITIONERS

v.

* NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RETAIL CLERKS INTERNATIONAL ASSOCIATION, ITS LOCALS 1262 AND 1552 AFL-CIO, INTERVENORS

ON PETITION to Review and Set Aside and on Cross-Petition to Enforce an Order of the National Labor Relations Board.

Decided February 11, 1969.

Before: WEICK, Chief Judge, and PECK and MCCREE, Circuit Judges.

PER CURIAM. Unfair labor charges filed against the petitioners resulted in an order of the National

Labor Relations Board determining it to have been guilty of unfair labor practices and ordering it to bargain with the intervening locals of the Retail Clerks International Association. The matter is here presented under a petition to review and to set aside that order and under the Board's cross-petition for its enforcement.

Petitioners are engaged in the operation of discount retail department stores in various states including Ohio, New York, Massachusetts, Indiana and Maryland. In January, February and March of 1965 separate charges were filed by individual locals of the International and by the International itself in the First, Third, Fifth, Ninth, Thirteenth and Twenty-fifth Regional Offices of the National Labor Relations Board. Each alleged a refusal to bargain by the petitioners, in addition to alleging other unfair labor practices. After dismissal of those in the two latter Offices, those from the other Offices were consolidated for hearing and the decision of the Board in the consolidated cases is reported at 169 NLRB No. 43. In the present review the issues arise from the operation of the stores in Springfield, Ohio, and Glens Falls, New York.

The Board found the petitioners guilty of unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 158(a)(1)) at the Springfield, Ohio, store, primarily on the basis of a request allegedly made by one of its managers to an employee asking that she "talk against the Union" at a meeting, and of statements allegedly made by a department head and a store manager to a second employee, coupled with a five cent an hour increase to her. Based on a review of the printed record only we would be hard pressed to reach the

conclusions arrived at by the Trial Examiner, who, "following a familiar pattern," credited the testimony of the employees and discredited that of the witnesses for the petitioners. *N.L.R.B.* v. *Welsh Industries*, 385 F.2d 538, 540 (6th Cir. 1967); see also *N.L.R.B.* v. *Fischbach Trucking Co.*, 398 F.2d 352 (6th Cir. 1968). However, it cannot be said that the Board's conclusions are not supported by substantial evidence or are clearly erroneous, and we therefore cannot disturb them. Section 160(e), Title 29, U.S.C.; *Universal Camera Corporation* v. *N.L.R.B.*, 340 U.S. 474, 490-491 (1951).

The Board found that petitioners committed several violations of Section 8(a)(1) of the Act at the Glens Falls store by intimidating an employee for conversing with Union organizers, by advising employees that it had a list of those who had signed cards, by interrogating them as to their union activity, by threatening that signing a card would jeopardize jobs, and by engaging in surveillance of union meetings. Again, were it our function to reach an independent determination on the basis of the record it is probable that it would be at variance from that made by the Trial Examiner, but the determination of the Board must be permitted to stand since it is supported by substantial evidence and is not clearly erroneous.

While in accordance with the foregoing enforcement of the Board's order will be decreed to the extent that it requires petitioners to cease and desist from the unfair labor practices and from in any other manner interfering with, restraining or coercing its employees in the exercise of their statutory rights, we entertain doubt as to the propriety of ordering bargaining at the Glens Falls store at this late date.

Although the charge in connection with the Glens Falls store was filed January 7, 1965, the Trial Examiner did not issue his decision until nearly a year later (December 30, 1966), and the order of the Board did not follow until November 16, 1967. The determination of the Union's majority status was made on the basis of the store payroll as of December 22, 1964, and we need not resort to judicial notice to determine that retail clerical personnel is not unvarying since it is apparent from this record that in this store changes in personnel status were frequent. We therefore conclude that we may not with justification assume that the majority status persists which existed years ago. We are not unmindful of the general rule to the effect that a condition shown to exist will be presumed to continue until the contrary is shown, but this rule is without application to this situation where the record discloses the original condition not to have been a constant one and where a protracted period of time has elapsed. We add that our apprehension on this score is hardly abated by the fact that the 1964 majority determination was made on the basis of authorization cards, "a notoriously unreliable method of determining the majority status of a union." *N.L.R.B.* v. *Flomatic Corporation*, 347 F.2d 74, 78 (2d Cir. 1965); *Pulley* v. *N.L.R.B.*, 395 F.2d 870 (6th Cir. 1968); *Peoples Service Drug Stores, Inc.* v. *N.L.R.B.*, 375 F.2d 551 (6th Cir. 1967).

In accordance with the foregoing, enforcement of the Order of the National Labor Relations Board entered November 16, 1967, is granted to the extent not inconsistent herewith, and the case is remanded to the National Labor Relations Board for a determination as to whether in view of the passage of time

since the entering of its Order that portion thereof requiring petitioners to bargain collectively with Local 1262, Retail Clerks International Association, AFL-CIO, is still appropriate. Specifically, the Board is enjoined to determine the extent to which there has been a change in the identity of the employees since the time demand for recognition was made. If such change is found to have been substantial it is directed that the Board cause a representation election to be conducted.

APPENDIX B

No. 18,354

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed Feb. 11, 1969 Carl W. Reuss, Clerk

CLARK'S GAMBLE CORPORATION d/b/a CLARK'S DISCOUNT DEPARTMENT STORE, AND M. N. LANDAU STORES, INC., d/b/a CLARK'S STORES, PETITIONERS

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

RETAIL CLERKS INTERNATIONAL ASSOCIATION AND ITS LOCALS 1262 AND 1552, AFL-CIO, INTERVENOR

ORDER

BEFORE: WEICK, Chief Judge, PECK and MCCREE, Circuit Judges.

On petition to review and set aside an order of the National Labor Relations Board, and cross-petition for enforcement of its order;

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the order of the Board is enforced to the extent not inconsistent with the opinion, and the case is remanded to the National Labor Relations Board for further proceedings in accordance with the opinion.

Each party to pay its own costs in this Court.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

No. 18,354

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CLARK'S GAMBLE CORPORATION d/b/a CLARK'S DISCOUNT DEPARTMENT STORE, AND M. N. LANDAU STORES, INC., d/b/a CLARK'S STORES, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ORDER

Before: WEICK, Chief Judge, and PECK and McCREE, Circuit Judges.

Respondent's petition for rehearing having come on to be considered, and a majority of the judges of this Court who are in regular active service not having favored ordering consideration en banc,

IT IS ORDERED that the petition be, and it is hereby denied,

Entered by Order of the Court

/s/ Carl W. Reuss
Clerk

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases Nos. 1-CA-4904
1-CA-4932

M. N. LANDAU STORES, INC., d/b/a CLARK'S STORES
and
LOCAL 1459, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

Case No. 3-CA-2516

M. N. LANDAU STORES, INC., d/b/a CLARK'S STORES
and
LOCAL 1262, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

Cases Nos. 5-CA-3060
5-CA-3067
5-CA-3082

CLARK'S DUNDALK, INC.
CLARK'S BROOKLYN PARK, INC.
and
RETAIL STORE EMPLOYEES UNION, LOCAL 692, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

Cases Nos. 9-CA-3451
9-CA-3487

CLARK'S SPRINGFIELD, INC.
CLARK'S GAMBLE SPRINGFIELD, INC.
CLARK'S LANDAU SPRINGFIELD, INC.
and
LOCAL UNION NO. 1552, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

DECISION AND ORDER

On December 30, 1966, Trial Examiner Frederick U. Reel issued his Decision in the above consolidated proceedings, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondents had not engaged in certain other alleged unfair labor practices, and recommended that those allegations of the complaints be dismissed. Thereafter, the General Counsel and the Charging Parties filed exceptions to the Trial Examiner's Decision and supporting briefs, and the Respondent filed cross exceptions and a supporting and answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Decision and the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with respect to the cases involving the stores at Holyoke, Massachusetts (Cases Nos. 1-CA-4904, 4932), and at Baltimore, Maryland (Cases Nos. 5-CA-3060, 3067, 3082). With respect to the store at Springfield, Ohio (Cases Nos. 9-CA-3451, 3487), we adopt the findings, conclusions, and recommendations of the Trial Examiner, except as they pertain to the alleged violation of Section 8(a)

(5).[1] Finally, with respect to the Glens Falls and Saratoga Springs,[2] New York, case (3-CA-2516), we adopt the findings, conclusion, and recommendations of the Trial Examiner, with the following additions and modifications.

1. The Trial Examiner found that, in December 1964, Godfrey and Williams, head guard and assistant head guard, respectively, of the Glens Falls store (both of whom were also employed as police officers of that city), observed employees entering and leaving a Union meeting in Glens Falls. Accepting the testimony of both that they were discharging their routine duties as police officers, and in the absence of any affirmative evidence that they were told to spy on the employees or reported the names of any employes attending the meeting, the Trial Examiner did not find that there was any unlawful surveillance in violation of Section 8(a)(1), as alleged in the complaint. We find merit in the exceptions of the General Counsel and the Charging Party to his failure to so find, as the weight of the evidence requires a finding of unlawful surveillance. Thus, when the organizers commenced entering the Glens Falls store, earlier in the month of December, store manager Dunne told the guards to "keep their eye" on the organizers. They did so, and Dunne never retracted these instructions. Indeed, Dunne and assistant store manager Eastman discussed with God-

[1] We have previously granted the motion of the Charging Party in the Springfield cases to withdraw its 8(a)(5) charge, and have dismissed the 8(a)(5) charge without considering its merits.

[2] We hereby correct the Trial Examiner's Decision as to the name of this locality, since there is no Saratoga, New York, and Saratoga Springs is obviously the store location involved, some 20 miles from the Glens Falls store herein.

frey which employees Dunne and Eastman thought were for the Union. Thereafter, on December 10, Williams, whose beat covered several blocks, observed employees who were entering the Union meeting and shook his head at them in a negative fashion. Two hours later, Williams was still standing in the same place and Godfrey, who supervises police activity throughout the city, was with him. At that time they observed employees leaving the meeting. Under the circumstances, and in the absence of any demonstrated reason for Williams' continued presence outside the Union meeting hall, we find that Godfrey and Williams were engaged in surveillance of the employees who attended the meeting and that, in doing so, they were acting within their authority as Respondent's agents to "keep an eye" on the organizing campaign. Moreover, other conduct by Godfrey and Williams which the Trial Examiner found unlawful further serves to confirm this conclusion. Thus, the Trial Examiner found that Williams, in accordance with his instructions to "keep an eye" on organizers,[3] unlawfully threatened employee Palmer and warned employee Joiner in connection with their Union activity, and Godfrey unlawfully conveyed an impression of Union surveillance to employees Morehouse and Myette.

2. The Trial Examiner also found that Godfrey, a supervisor, admitted that, in December 1964, he discussed the Union with two female employees and suggested that the girls in the store could approach Dunne as a group without a union and obtain the improved working conditions they desired. Reason-

[3] We note also that these instructions were followed by Godfrey with respect to employee Noonan, who was found by the Trial Examiner to have been unlawfully intimidated by Godfrey and Dunne.

ing that Godfrey's suggestion was only a friendly personal expression, and noting that the employees were strong Union supporters and rejected his suggestion, the Trial Examiner found that such suggestion was only isolated and did not violate Section 8 (a) (1). We cannot agree. It is true that the conversation was a friendly one and that the two employees openly displayed their Union adherence and rejected the suggestion that they would obtain benefits if they refrained from Union adherence. But such a suggestion has been recognized to be an interference with Section 7 rights and thus violative of Section 8(a)(1), and we so find here.[4] Moreover, the illegality of the remarks is not cured by the casual nature of the conversation or the personal relationship of the parties thereto,[5] nor by the immediate rejection of Godfrey's suggestion by the two Union adherents.[6]

3. The Trial Examiner also found that, in January 1965, Clark, a supervisor and agent of the Respondent, told employee French that a "big layoff" was in prospect but that she would not be laid off as long as she minded her own business and stayed out of trouble. When French asked Clark if this was a threat, he denied that it was but asked, "What are you going to do, run to the Union?" The Trial Examiner, characterizing the foregoing merely as "a conversations," did not find it violative of Section 8(a)(1). We disagree. Clark's own question addressed to French, as to whether she was going to run to the Union, evidences his recognition that French took his statement as a threat of layoff if she

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[4] *Henry Colder Company*, 163 NLRB No. 13.

[5] *Arkansas Grain Corporation*, 160 NLRB No. 28.

[6] *Murray Ohio Manufacturing Company*, 155 NLRB 239.

engaged in Union activity. The fact that French denied that she would go to the Union does not negate the coercive effect of such a threat. *Arkansas Grain Corporation, supra.* Accordingly, we find Clark's statement to be a threat of reprisal if French engaged in Union activity and thus a violation of Section 8(a)(1).

4. In late January 1965, Montero, the head cashier on the night shift, interrogated employee Doran as to whether anyone from the Union had been around recently. The Trial Examiner found that such interrogation was not attributable to the Respondent, as Montero was not a supervisor. His reason for so finding was that Montero performed substantially the same duties as Myette, the head day cashier, who the parties agreed was not a supervisor. We disagree with the Trial Examiner's conclusion that Montero was not a supervisor for the following reasons: (1) because of the parties' agreement that Myette was not a supervisor, Myette's duties, unlike those of Montero, were not fully litigated, and there is here no evidentiary basis for using Myette's admitted status as determinative of Montero's; and (2) because Montero worked nights, when most of the management hierachy were not present, she had need to exercise supervisory authority, and in fact she did possess and exercise such authority. Thus, the record shows that: (a) she was told by Respondent's New York headquarters that she would have charge of the night girls on the registers, and New York management informed the girls of this fact; (b) Montero responsibly directs from 6 to 16 girls in packing and cash register work, e.g., she schedules who is to work, and effects transfers to and from the registers, packing, and other departments; and (c) she possesses and has exercised the power to recommend which employ-

ees are to be retained during a layoff. Under the foregoing circumstances, we find that Montero is a supervisor within the meaning of Section 2(11) of the Act, that Respondent held her out as such to employees, and that, through her interrogation of Doran, Respondent violated Section 8(a)(1) of the Act.

5. The Trial Examiner found that the Respondent did not violate the Act by its refusal to recognize the Union as the representative of the Respondent's employees in its Glens Falls and Saratoga Springs stores and that no bargaining order was necessary to remedy the violations of Section 8(a)(1). We do not agree as to Glen Falls.[7]

Early in December 1964, the Union began openly organizing and, as found *infra*, by December 22, 1964, had obtained authorization cards signed by a majority of employees in the Glens Falls store.[8] On December 22, 1964, the Union sent to Respondent's New York office a telegram in which the Union claimed to represent a majority of the employees in the Glens Falls and Saratoga Springs stores, including leased departments;[9] offered to produce the authorization cards it had obtained for check by an impartial and disinterested person; and demanded recognition and bargaining. The New York office replied

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[7] As we are finding the single store unit appropriate and there are on unfair labor practices at Saratoga Springs, it would, of course, be inappropriate to order bargaining for the Saratoga Springs store.

[8] There is no evidence that the Union sought to organize employees in the Saratoga Springs store. There are no Union authorization cards in evidence from employees at that store.

[9] One leased department, the Central Market, was excluded. It is evident from the Company's petition in Case No. 3-RM-314 that the Company was aware of this exclusion.

by letter the same day, declining to recognize the Union. Contemporaneously with the Company's reply, the Company's area supervisor, the Glens Falls store manager, the assistant store manager, and other management personnel engaged in the extensive and serious violations of 8(a)(1), as found herein, including systematic interrogations, surveillance, intimidation, and threats to employees who had engaged in Union activity. Also contemporaneously with such 8(a)(1) conduct, the Respondent filed a petition in Case No. 3-RM-314 in which Respondent asserted that the unit requested by the Union was inappropriate because it included the two stores and leased departments.[10]

The Trial Examiner found, as to the unit question, that the two-store unit in which the Union sought recognition was inappropriate, because the two stores were "unrelated in any significant respect," but that "the Glens Falls store constitutes a separate unit." We agree with the unit finding of the Trial Examiner. *Sav-On Drugs, Inc.*, 138 NLRB 1032, 1033.

The Trial Examiner further found, and we agree, that even though the Union's requested two-store bargaining unit was inappropriate, a bargaining order confined to a unit of employees at the Glens Falls store might be appropriate. Under our view of the case, such bargaining order confined to the Glens Falls store, which we find separately is an appropriate unit, is required to remedy Respondent's unfair labor practices at that store, since it appears that the Union did represent a majority in an appropriate unit limited to the Glens Falls store on December 22,

[10] In this RM petition, the Respondent stated that the unit in which the Union claimed recognition was comprised of 88 employees, including 12 employees in the leased departments.

1964,[11] and since the Respondent's subsequent unfair labor practices were of a kind calculated to dissipate that majority and to preclude a fair resolution of the questions concerning representation.

We find that employees in the leased or licensed departments at Glens Falls, other than the Central Market, should be included in the unit. Under the terms of the leases between the Company and all of the lessees or licensees, *(Topsy's International, Inc., Morton Shoe Company, Jewelco Inc., Richlin Corp. of Glens Falls, Eastern Merchandising Corp.,* and *Nu-Enamel Company,)* other than Central Market, the Respondent has control over the employees to be hired and retained by the leased departments and has explicit authority to settle and determine labor disputes. In the case of the Central Market, no such control exists. Except for the Central Market, which handles groceries, is separately located, and opens earlier, the leased departments are in the same work areas as all other departments, and their employees have the same working conditions as other employees of the Respondent. In view of the foregoing circumstances, and particularly in light of the control exercised by Respondent over the employees and the labor relations of its licensees, we find that Respondent and the licensees are joint employers, and that the employees in all leased departments except Central Market should be included in the unit. *K-Mart, a division of S. S. Kresage Company,* 159 NLRB No. 28.

Other facts relevant to the unit and the Union's majority as of December 22, 1964, are as follows:

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[11] The Trial Examiner did not explicate his reasons for finding that the Union possessed a majority among the Glens Falls employees. Accordingly, we set forth our applicable findings *infra* with respect to the Union's majority in the appropriate unit.

Glens Falls Payroll

On December 22, 1964, the date on which the Company received the Union's request for recognition, there were 102 names on the Glens Falls store payroll—these are contained in Appendix A attached hereto. Of these, it appears from the uncontradicted testimony of Dunne, whom we credit, that the following 34 names represent temporary employees who we find should be excluded: Carol Acken, Barbara Allen, Dorothy Aurelia, Linda Barot, Nancy Baugh, Dorothy Bennett, Dorothy (Estelle) Brayton, Shirley Cross, Helen Dickson, Karen Dowmont, Joanne Dudley, Georgeanne (Georgia) Flanders, Carmela Gilbert, Kay Gilbert, Dorothy Griffin, Mary Jane Judson, Anita Kanner, Marilyn Lewis, Nancy Mansell, Mary Lou McDonald, Alice McEachron, Joanne Minson, Dorothy Mosher, Jean Morehouse, Barbara Parsons, Audrey Pikul, Wanda Reed, Donna Roberts, Jane Schumann, Kenneth St. John, Sharon Thatcher, Sandra Tripp, Blanche Wood, and Gertrude Wood.

Although Dunne expressed some uncertainty whether Joan Brownell was a temporary or permanent employee, his uncontradicted testimony shows that Brownell was hired during the week ending August 22, 1964, and worked about three nights a week until September 12, 1964, when she left the Company's employ. She returned to work during the week ending December 5, 1964, and left the week ending December 26, 1964. As Brownell was hired to work during the Christmas season only, it is clear, and we find, that she was a temporary employee who should be excluded from the unit. We shall also exclude Joan Wilcox from the unit, as she quit the Company's employ on December 21, the day before the Union's request for recognition, and has not returned to work. Thus, excluding the foregoing 36

employees, the resultant Glens Falls store payroll figure for the unit is 66.

The following disputed categories in Glens Falls remain for our disposition:

(a) *Name not on Glens Falls payroll. Lois Clark's* name does not appear on any payroll in evidence in this case. Respondent asserts that she was a temporary employee. However, the uncontradicted testimony of Dunne shows that she left on December 19, 1964, to enter the hospital and, following a stay in the hospital, returned to work in January, in accordance with Dunne's promise to her in the hospital that her job would be kept open for her return. Under the circumstances, we agree with the General Counsel that Lois Clark was a permanent employee on sick leave status following December 19, and thus should be included in the unit.

(b) *Alleged supervisors.* The Respondent contends that the duties of *Montero* and *Reinack* are not those of supervisors, as alleged in the complaint, and that they should be included in the unit. Since we have found, *supra*, that Montero is a supervisor, we shall exclude her from the unit. Similarly, we agree with the Trial Examiner's finding that Reinack is a supervisor, as well as a representative of Respondent, by virtue of his "management-trainee" status. We find, therefore, that he should be excluded from the unit.

(c) *Alleged temporary employees.* The Respondent contends that the names of *Dee Sullivan* and *Linda Wood* should be excluded from the unit because they were temporary employees. The Charging Party and the General Counsel would include them as regular employees for different reasons; respectively, that they must be considered permanent because they worked for 6 months, and that they were high school girls who were regular employees who were laid off,

as customary, when a layoff impends. We find that both employees should be included in the unit because it appears from the evidence in the record that they both worked regularly from June 1964 through December 1964, when they were included in a layoff because they were high school students rather than because their jobs were temporary.

(d) *Alleged quit.* The Respondents contend that *James Donovan* should be excluded from the unit because he gave notice to Dunne, prior to the Union's demand for recognition, that he would have to leave to go to work for the U. S. Post Office in Denver. The General Counsel would include Donovan in the unit because he was at work on December 22, 1964, and left that day to work temporarily with the Post Office for the Christmas season. It appears that Donovan returned to his job with the Company following his temporary Christmas work. Under these circumstances it would appear, and we find, that Donovan was on leave as a regular employee and thus should be included in the unit. In accordance with our foregoing findings, we compute the number of employees on the Glens Falls payroll to be included in the unit at 65.[12]

Leased Department Payrolls

On December 22, 1964, there were 22 names on the payrolls of the leased departments, excluding the Central Market. These names are contained in Appendix B attached hereto.

Jewelco, Inc. We find from the testimony of Margaret Pincheon, which we credit, that Wilhelm and Burns were regular employees of the Respondent and Jewelco, Inc., as joint employers, on December 22,

[12] By adding Lois Clark to the unit, and excluding Montero and Reinack.

1964, and should be included in the unit. We shall, however, exclude Pincheon as she is a supervisor, who hired these employees. The only disputed name appears to be that of Andrews, who is similar in status to Donovan, *supra*, whom we have included. Andrews was hired by Pincheon in March 1964. She was not considered to be temporary according to Pincheon, and worked until December 24, 1964, when she left because she became pregnant. She gave notice of her leaving in November as permanent. As she was a regular employee at work on December 22, 1964, we shall include Andrews in the unit.

Richlin. We find from the testimony of Robert Bridges, which we credit, that Bridges is a supervisor in the Richlin concession and should be excluded. Based on his credited testimony, we find that Lewis Floyd was a regular employee on December 22, 1964, and thus should be included in the unit. The Charging Party would exclude the other two named employees, Judy Smith and Henry Hunt. The General Counsel agrees as to Smith, but would include Hunt. Smith attends college out of town and was hired in early December 1964, for the Christmas season. She left shortly after December 22, 1964, to return to college. We find that Smith is a temporary employee who should be excluded. Henry Hunt was hired the second or third week in November 1964, and worked until February 1965. According to the testimony of Bridges, who hired Hunt, Hunt asked for a temporary job to last until the company for which he had been working ended its shutdown due to a strike. Although the record does not affirmatively show the circumstances under which Hunt's employment was severed in February, we infer that Hunt's job was only temporary, and we shall, therefore, exclude him from the unit.

Eastern Merchandising. Ann Gitto was the only employee in this concession as of December 22, 1964, and had been the only employee for a considerable period. Except for Easter time, there has been no one else in the department. Contrary to the Respondent's contention, and in agreement with the Charging Party and the General Counsel, we find from the record that she is not required regularly to exercise supervisory authority and is an employee to be included.[13]

Morton's Shoe. The payroll for this concession for the week ending December 19, 1964, lists the names of Larry Ballard, Mgr., Erma Gilchrist, Josephine Funicello, Elizabeth Sheerer, and Kathleen Durkee. We shall exclude Ballard from the unit because the record shows he is a supervisor. As such payroll was conceded by the Respondents to be the same as of December 22, 1964, and as Ballard in his testimony named only Durkee as temporary, we infer that all the others, i.e., Gilbert, Funicello, and Sheerer, were regular employees on December 22 and shall include them in the unit.[14] In his testimony Ballard expressed some uncertainty as to what were Durkee's actual days of work, but stated that he was certain she worked full-time until November 7, 1964. Ballard thought she worked only one day, or not at all, since November 1964. Since there is no evidence that Durkee was at work as a regular employee on De-

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[13] *Eastern Camera and Photo Corp.*, 140 NLRB 569, 571.

[14] We do not accept Ballard's retraction on cross-examination in an attempt to show that Sheerer was temporary. It is apparent from the testimony of both Ballard and Sheerer that she is a regular employee and was employed as such on December 22.

cember 22, and in agreement with the Charging Party, we shall exclude Durkee from the unit.

Nu-Enamel. Albert Constantine is the only name appearing on the payroll of this concession as of December 22, 1964. Constantine was employed there from November 4, 1962, through December 27, 1964. No other employee worked with him. The Respondents contend that Constantine is a supervisor because he was the manager of the concession and was authorized to spend money from petty cash when he needed help to unload a truck. Constantine testified that he spent money for such purpose on infrequent occasions amounting to not more than six times in 2 years. It appears that Constantine also used petty cash to obtain other help on sporadic occasions and that, in his absence, Dunne may have directed store personnel to "cover" the *Nu-Enamel* concession. Under the foregoing circumstances, we find that Constantine's duties were primarily those of a salesman and that he neither possessed nor exercised regular duties of a supervisor, as defined in the Act. Accordingly, we find that Constantine is an employee who should be included in the unit.

Topsy's. This concession's payroll for the week ending December 19, 1964, which Respondents concede is also applicable on December 22, 1964, lists the following names: Florence Lawson, Annette Joiner, Joe Noonan, Thomas Le Pan, Phyllis McDonald, Henry Palmer, and Kathleen Crothy. In agreement with the parties, we shall exclude Lawson from the unit as a supervisor, and Palmer and Crothy as temporary employees, and shall include Noonan as a regular employee. Thomas Le Pan was working at the snack bar of this concession for some time prior to and including December 22, 1964; he was still working there as of April 1965. Joiner was also

working there during this period of time at the snack bar, under Lawson, and did not become manager of the concession until Lawson left in January 1965. McDonald was a full-time employee who worked on December 22, 1964. Accordingly, we shall include in the unit Le Pan, Joiner, and McDonald. Thus, in agreement with the Respondent and the Charging Party, we find a total of 12 employees in the unit among the leased departments.

From the employees whom we find herein to be included in the unit, the General Counsel submitted in evidence 58 signed cards bearing the signatures of employees authorizing the Union to represent the signers and dated between October 1964, and January 21, 1965.[15] All of them were authenticated by the signer or by an employee or organizer who witnessed the signing, or who was informed by the signer that it was his or her signature. We accept the testimony of the witnesses in this regard.[16] The Respondent questions the authorization cards which it claims were signed by individuals who it contends should not be included in the unit or cards solicited by Constantine, who it contends is a supervisor. We have rejected these contentions of the Respondent in our findings, *supra*. The Respondent also would exclude the cards obtained by organizers Forsythe and Lynch, on the ground that the Union promised to waive initiation fees for those employees who signed cards, and, in the case of Lynch, on the additional ground that he informed the employees that the cards

[15] All but 6 of these cards were signed before December 22, 1964.

[16] *The Colson Corp.* v. *N.L.R.B.*, 347 F. 2d 128 (C.A. 6), cert. denied, 382 U.S. 904; *Lifetime Door Company*, 158 NLRB 13.

were for the purpose of getting an election at the store. The record does not support these contentions. As we find all 58 cards to be valid, and as the unit consists of a total of 77 employees (12 in the leased departments and 65 in the other departments), including the card signers, we find that the Union had a majority in the appropriate unit at all relevant times.

The record establishes that, at the time it made its demand for recognition, the Union represented 52—a majority—of the employees in the appropriate unit. The Trial Examiner, however, concluded that the unfair labor practices he found were only "isolated" and did not either establish Respondent's bad faith in declining to recognize the Union or tend to dissipate the Union's majority so as to prevent a fair resolution of the question concerning representation through a Board-conducted election. In addition to the unfair labor practices found by the Trial Examiner, however, we have found many additional violations of Section 8(a)(1). We cannot agree, therefore, that Respondent's violations were isolated, or that they did not tend to dissipate the Union's majority status, and to destroy the conditions for a free and fair election. Accordingly, we find that it is necessary, in order to remedy the unfair labor practices committed and to restore the *status quo ante*, to issue a remedial order requiring the Respondent to bargain with the Union, on request.[17] Under these circumstances, we find it unnecessary to decide whether Respondent had violated Section 8(a)(5) as well, for the remedial order for such violation would be no

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[17] *Better Val-U Stores of Mansfield, Inc.*, 161 NLRB No. 71, and cases cited in footnote 2 thereof.

different from that which we are ordering to remedy the violations of Section 8(a)(1).

The Remedy

Having found that the Respondent, M. N. Landau Stores, Inc., d/b/a Clark's Stores, has engaged in unfair labor practices in addition to those found by the Trial Examiner, we shall order it to cease and desist therefrom and take certain additional affirmative action to effectuate the policies of the Act.

As we have found that this Respondent has engaged in serious and extensive 8(a)(1) unfair labor practices which are of a kind calculated to dissipate the Union's majority and which prevent the holding of a fair and free election, we shall order the Respondent to bargain, upon request, with the Union to remedy its 8(a)(1) violations.

Upon the basis of the foregoing, and upon the entire record in these consolidated cases, the National Labor Relations Board hereby makes the following:

Additional and Amended Conclusions of Law

1. Respondent, M. N. Landau Stores, Inc., d/b/a Clark's Stores at its Glens Falls, New York, store, has, by manager Dunne's and guard supervisor Godfrey's intimidatory treatment of employee Noonan; by assistant manager Eastman's directive to employee Joiner not to talk to organizers; by Godfrey's statement to employees that Dunne had a list of those who had joined the Union; by store guard Williams' threats to employees Joiner and Palmer; by Godfrey's and Williams' surveillance of a Union meeting; by Godfrey's suggestion to employees that they deal with Dunne directly rather than through the Union; by department head Reinack's interrogation of, and

warning to, employees Joiner and Palmer; by department head Clark's threat to employee French; and by supervisor Montero's interrogation of employee Doran in a coercive manner; interfered with, restrained, and coerced employees in their exercise of rights guaranteed in Section 7 of the Act and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. All employees employed at Respondent's Glens Falls, New York, store, including employees in the leased or licensed departments, but excluding employees of the Central Market, store managers, assistant store managers, watchmen, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9(b) of the Act.

3. At all times since December 22, 1964, Local 1262, Retail Clerks International Association, AFL-CIO, a labor organization herein, has been, and now is, the exclusive representative of all the employees in the above appropriate unit, for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondents, Clark's Gamble Corporation d/b/a Clark's Discount Department Store (as successor to Clark's Springfield, Inc.,

Clark's Gamble Springfield, Inc., and Clark's Landau Springfield, Inc.) Springfield, Massachusetts, and M. N. Landau Stores, Inc., d/b/a Clark's Stores, Glens Falls New York, their officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order, as herein modified.

1. Insert in lieu of paragraph II. A. of the Trial Examiner's recommended Order the following:

"A. Cease and desist at its Glens Falls, New York, store, from intimidating employees because they conversed with Union organizers, forbidding employees to converse with organizers, advising employees that it has a list of employees who have signed union cards, spying on union meetings, interrogating employes as to union activity, threatening employees that by signing a union card they would jeopardize their jobs, or in any other manner interfering with, restraining, or coercing its employees (including employees in leased departments) in the exercise of their rights under Section 7 of the Act."

2. Insert the following as new subparagraph 1 of paragraph II. B. and renumber present subparagraphs 1 and 2 of said paragraph, 2 and 3, respectively:

"1. Upon request, bargain collectively with Local 1262, Retail Clerks International Association, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an agreement is reached, embody such understanding in a signed agreement. The unit is:

All employees employed at its Glens Falls, New York, store, including employees in the leased or

licensed departments, but excluding employees of the Central Market, store managers, watchmen, guards, and supervisors, as defined in the Act."

3. The Notice attached as Appendix B to the Trial Examiner's Decision is modified by deleting the indented paragraph of said Appendix and inserting in lieu thereof the following:

> WE WILL NOT intimidate employees because they conversed with union organizers, forbid employees to converse with organizers, advise employees that we have a list of employees who have signed union cards, spy on union meetings, interrogate employees as to union activity, threaten employees that by signing a union card they will jeopardize their jobs, or in any other manner infringe on employees' rights under Section 7 of the National Labor Relations Act, as amended.
>
> WE WILL, upon request, bargain collectively with LOCAL 1262, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, as the exclusive representative of employees in the following appropriate unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The unit is:
>
> > All employees employed at our Glens Falls, New York store, including employees in leased departments, but excluding employees of the Central Market, store managers, assistant store managers, watchmen, guards, and supervisors, as defined in the National Labor Relations Act, as amended.

IT IS FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed insofar as it alleges unfair labor practices not found herein by the Board.

Dated, Washington, D. C.

FRANK W. MCCULLOCH, Chairman

JOHN H. FANNING, Member

SAM ZAGORIA, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX A

Carol Acken
Barbara Allen
Dorothy Aurelia
Patricia Basque
Linda Barot
Nancy Baugh
Judy Beane
Dorothy Bennett
Fred Bennet
Shirley Bordeau
Jane Brady
Dorothy Brann
Estelle Brayton
Nancy Brownell
Joan Brownell
Marjon Campbell
Patricia Caprood
Georgianna Carpenter
Jerry Clark
Linda Conlon
Janet Cook
Shirley Cross
Sophie Corlew
Phyllis Croft
Sarah Cure
Cheryl Dean
Charmaine De Lucca
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Joanne Dudley
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Lorraine Springer
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Gary St. John
Kenneth St. John
Dee Sullivan
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Sharon Tromblee
Florence Viele
Theresa Whaley
Joan Wilcox
Blanche Wood
Lynda Wood
Gertrude Wood
Janet Zwolak

APPENDIX B

Jewelco, Inc.

J. Andrews
J. Byrnes
M. Wilhelm
M. Pincheon

The Richlin Corporation of Glens Falls, Inc.

Robert Bridges
Lewis Floyd
Henry Hunt
Judith Smith

Eastern Merchandising Corporation

Ann Gitto

Morton's Shoe

Larry Ballard, Mgr.
Kathleen Durkee
Josephine Funicello
Erma Gilchrist
Elizabeth Sheerer

Nu-Enamel Company

Albert Constantine

Topsy's

Kathleen Crothy
Annette Joiner
Florence Lawson
Phyllis McDonald
Thomas Le Pan
Joe Noonan
Henry Palmer

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
Washington, D.C.

Cases 1—CA—4904
1—CA—4932

M. N. LANDAU STORES, INC. d/b/a CLARK'S STORES
and
LOCAL 1459, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

Case 3—CA—2516

M. N. LANDAU STORES, INC. d/b/a CLARK'S STORES
and
LOCAL 1262, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

Cases 5—CA—3060
5—CA—3067
5—CA—3082

CLARK'S DUNDALK, INC.
CLARK'S BROOKLYN PARK, INC.
and
RETAIL STORE EMPLOYEES UNION, LOCAL 692 RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

Cases 9—CA—3451
9—CA—3487

CLARK'S SPRINGFIELD, INC.
CLARK'S GAMBLE SPRINGFIELD, INC.
CLARK'S LANDAU SPRINGFIELD, INC.
and
LOCAL UNION NO. 1552, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

Edward T. Maslanka, Esq., Region 13; *Benjamin Blackburn, Esq.*, Region 5; *Mark Fox, Esq.*, Region 9; *Henry M. Kelleher, Esq.*, Region 1; and *Arthur Neubauer, Esq.*, Region 3, for the General Counsel.

Earle K. Shawe, Esq., *Lawrence S. Wescott, Esq.*, and *Daniel P. Dooley, Esq.*, all of Baltimore, Md.; *Leon Novak, Esq.*, of Schenactady, N.Y.; and *Allan A. Tepper, Esq.*, of Boston, Mass., for the Respondents.

Tim Bornstein, Esq., of Washington, D.C.; *David Clayman, Esq.*, of Columbus, Ohio; *Robert Karmel, Esq.*, of Chicago, Ill.; *Warren H. Pyle, Esq.*, of Boston, Mass.; *Howard S. Simonoff, Esq.*, of Camden, N.J.; and *Melvin J. Steinberg, Esq.*, of Baltimore, Md., for the Charging Parties.

Before: *Frederick U. Reel*, Trial Examiner.

Trial Examiner's Decision

Introductory Statement

This proceeding, heard at Washington, D.C., Baltimore, Maryland, Springfield, Ohio, Springfield, Massachusetts, and Lake George, New York, in November 1965 and on various dates in March, April, May, June, July, and September, 1966, originated with separate charges and complaints in the 1st, 3d, 5th, 9th, 13th, and 25th Regional Offices of the Board. Common to each of the complaints was an allegation that the Respondent named therein had unlawfully refused to bargain with the Charging Party as representative of the employees in the particular store or stores named in the complaint. Apparently for that reason, and because the labor policy of the Respondents allegedly emanated from a single national headquarters, the General Counsel on October 5,

1965, consolidated these cases for hearing. On November 12, 1965, Respondents moved to sever the cases; this motion I denied on December 10, 1965. However, on February 18, 1966, I granted General Counsel's unopposed motion to sever and dismiss the case originating in Region 13, and on September 28, 1966, I severed and dismissed the cases originating in Region 25 on motion of the Regional Director who advised that the surviving issues in those cases (the bargaining allegations having already been dismissed pursuant to an unopposed motion of the General Counsel) had been amicably settled.

This Decision, therefore, deals only with the cases arising in Regions 1, 3, 5, and 9, referred to hereinafter as the Holyoke, Glens Falls, Baltimore, and Springfield cases, respectively. Upon consideration of the entire record,[1] including my observation of the witnesses, and after due consideration of the briefs and memoranda filed by the parties, I make the following:

Findings of Fact

* * * *

III. The Glens Falls Case

A. *Statement of the Case*

This aspect of the matter, heard at Lake George, New York, May 17-20, 1966, originated with a charge filed January 7, 1965, by Local 1262, Retail Clerks International Association, AFL-CIO (which in this section of this Decision is referred to as the Union), and a complaint issued September 23, 1965 alleging that M. N. Landau Stores, Inc., d/b/a Clark's Stores (hereinafter referred to as the Company for purposes

[1] General Counsel's motion to correct certain errors in the transcript is hereby granted.

of this section) had violated Section 8(a)(1) and (5) of the Act at its stores in Glens Falls and Saratoga, New York. At the opening of the hearing, the complaint was amended over the Company's objection to add additional allegations of 8(a)(1) violations. The complaint was further amended during the course of the hearing to allege that one Godfrey, originally alleged to be an "agent" of the Company, was also a "supervisor."[12]

B. *The Unfair Labor Practices*

1. The bargaining issue

During an organizing drive in the Glens Falls store in the late fall of 1964, the Union obtained signed authorization cards from a majority of the employees in that store. On December 22, 1964, the Union sent the Company's New York office a telegram, in which the Union asserted that it represented a majority of the employees in a unit consisting of the Glens Falls and Saratoga stores, offered to produce the authorization cards for a card check by "an impartial and disinterested person," and demanded recognition and bargaining. The Company replied by letter that same day, declining to recognize the Union, stating that the Company "has no way of knowing" whether the Union represented a majority, and suggesting that the Union pursue the matter by using the processes of the Board. One month later the Company filed an RM petition which the Regional

[12] The pleadings establish that the Company operates discount department stores at Saratoga and Glens Falls, where it is engaged in commerce within the meaning of the Act and within the Board's jurisdictional standards, and that the Union is a labor organization within the meaning of the Act.

Office dismissed after issuing the complaint in this case.

Although the Union's bargaining demand was for a two-store unit, I find that a unit of two stores, unrelated in any significant respect, would not be appropriate and that the Glens Falls store constitutes a separate unit. For reasons which will become evident, I see no need to expand on my grounds for finding the single-store unit. The fact that the Union's demand was made for an inappropriate unit would not, however, dispose of the case, for if the Union had a majority in the Glens Falls unit and if company unfair labor practices tended to dissipate that majority and to prevent a fair resolution of the question concerning representation, an order confirming the Union's majority status could reasonably be entered to restore the *status quo ante* and to prevent the Company from profiting by its own wrong. Hence, here as in the Springfield and Holyoke cases discussed above, the controlling issue is whether the Company committed unfair labor practices of such a nature as to render appropriate the issuance of a bargaining order.

2. The violations of Section 8(a)(1)

a. *Alleged violations by admitted supervisors*

Store Manager Philip Dunne and Assistant Store Manager Merrill Eastman are admittedly supervisors within the meaning of the Act. Each of them is charged with violating Section 8(a)(1) in the latter part of January 1965; Dunne in connection with employee Noonan and Eastman in statements to employee Joiner.

The Noonan episode: On the afternoon of January 19, 1965, Joe Noonan, a 17- or 18-year old boy, was at work at the snackbar in the store, when union

organizer Wallis came in. Noonan asked Wallis how the union drive was going, and Wallis replied that a majority of the employees had signed authorization cards. Wallis then asked if Noonan wanted a card, and, receiving an affirmative reply, handed one to Noonan, who took it into a back room, signed it, and promptly returned it to Wallis. This exchange was observed at some distance by Charles Godfrey, a local police sergeant, who also was employed by the Company as its chief guard in the Glens Falls store, and who in this latter capacity was under standing instructions from Store Manager Dunne to "keep an eye" on the union organizers to see that they did not disturb employees during working time. Godfrey hastened to tell Dunne that an organizer had been talking to Noonan, and at Godfrey's urging Dunne and Godfrey immediately went to where Noonan was at work and asked him to accompany them to the office of a Justice of the Peace to make a statement as to what had transpired between him and the organizer. Noonan, who appeared "frightened" when he saw the store manager and the chief guard approaching, agreed to go with them at once, and in response to his question as to whether he was in trouble was reassured by Godfrey that it was the organizer, not Noonan, who was in trouble for wrongful action. The three went to the office of the Justice of the Peace, accompanied by another youthful employee, Frederick Bennett, who knew where the official lived. There Noonan gave a statement describing the episode recounted above.

The Eastman-Joiner episode: Annette Joiner, who had left the Company's employ by the time of the hearing, testified that in mid-January, 1965, while she was working at the snackbar, she visited at a table during a "coffee break" with two union or-

ganizers. Shortly thereafter, according to Joiner, Assistant Store Manager Eastman told her not to talk to the organizers, and she replied that she had the right of free speech, that she would talk to whomever she wanted to whenever she wanted to, and no one would tell her otherwise. Eastman denied the episode, remembering only that he had told Joiner that she should not be sitting at a table when the snackbar was busy. I credit Joiner's disinterested and detailed version, and I note that in another respect her testimony was corroborated by that of Williams, a company witness.

b. *Alleged violations by the guards.*

As noted above, Charles Godfrey, a local police officer, is the head guard at the Glens Falls store. He has several assistants who were hired pursuant to his recommendations, and whose hours of work he schedules. Among them were Charles Williams and Harold Osborne, who like Godfrey are also members of the local police force. The complaint alleges that all three men are agents of the Company, and was amended to allege that Godfrey is also a supervisory employee, an allegation I find sustained by the evidence just noted.

As to Osborne, the complaint alleges unlawful interrogation in December 1964. The evidence establishes that at that time he asked Manager-Trainee Jerry Clark if Clark know who the union organizers were. The context of the conversation is not shown on the record, but it may be noted that this occurred early in the union campaign and that the guards had been instructed to "keep an eye" on the organizers.

More serious allegations are leveled at Godfrey and Williams. As to Williams, the complaint alleged that he kept a union meeting under surveillance, that he

told employees they would lose privileges if the Union came in, and (by amendment at the hearing) that they would be discharged if they talked to organizers. As to Godfrey, the complaint names him as engaged in the surveillance with Williams, alleges violations in connection with the Noonan episode described above, and also alleges that he suggested to employees that they form their own group to deal with the Company, that he told them the Company knew who had signed cards, and that he told them to report the names of other card signers.

The evidence that Williams and Godfrey engaged in surveillance establishes that they were present on the street in the vicinity of a union meeting early in December, that Williams saw the employees both enter and leave the meeting, and that Godfrey was with Williams when they left. Both men testified that at the times in question they were discharging routine duties as police officers of Glens Falls, and there is no affirmative evidence that they were told to spy on the employees or that they reported to management the names of any employees attending the meeting. The meeting was held in a building located only a few doors from the main intersection in Glens Falls. Perhaps even a "naif, simple-minded" judge would find the circumstances suspicious, but even one with the Holmesian prescription of "something of Mephistopheles" could not find enough in this record to transmute the suspicions into a finding of surveillance.

Williams admitted telling employee Joiner that if the Union came in "things will tighten up." Employee Palmer testified that Williams told her that she would get into trouble talking to members of the Union, and that Dunne had said anyone caught talking with union members would be discharged. I credit Palmer's testimony over Williams' denial, except

that it is probable that the stricture Williams expressed was in terms of talking to organizers rather than mere members of the Union. Williams was under orders from Dunne to see to it that the organizers did not disturb employees during working hours, and Williams (who explained his admitted remark to Joiner as just the product of his own imagination based on "different sources" including experiences of his brother) could well have mistranslated Dunne's words into the language to which Palmer credibly testified.

Godfrey, whose participation in the Noonan and "surveillance" episodes has already been described, admitted that one evening in December 1964 while discussing the Union with two of its employee supporters at a restaurant, he suggested that the girls in the store could approach Dunne as a group without a union and obtain the improved working conditions they desired. He denied an episode, testified to by employee Jane Myette, in which Godfrey in December 1964 allegedly asked employee Jean Morehouse to turn over to him the names of girls who signed union cards and also stated that Dunne already had the names of those who had already signed. Myette, who stated that she overheard Godfrey's remarks to Morehouse, testified that Godfrey was smiling or laughing as he made them, but that she took seriously his statement that Dunne had a list of card signers. I credit Myette's testimony, based on consideration of her demeanor as contrasted with that of Godfrey, and the latter's admittedly faulty recollection of events in the period in question.

c. *Alleged violations by alleged supervisors*

(1) The allegedly unlawful statements

General Counsel alleges that Sylvia Montero, Jerry Clark, and Daniel Reinack were supervisory em-

ployees and that each of them engaged in unlawful interrogation.

Late in January 1965, Shirley Montero, the head night cashier, asked employee Diana Doran "if anyone from the Union had been around recently." During that same month Jerry Clark, a "manager-trainee," told employee Libby French that a "big layoff" was in prospect but that she would not be laid off as long as she minded her own business and stayed out of trouble. When French asked Clark if this was a threat he replied: "No, I am not threatening you. What are you going to do, run to the Union?" to which she rejoined that she was not, that she did not have to run to anybody, and that Clark should go away and leave her alone.

Two employees testified concerning alleged conversations they had with Daniel Reinack, a management-trainee in charge of the drug department. According to Sophie Corlew, an employee in that department, Reinack asked her the day after a union meeting in December 1964 whether she had attended the meeting, adding that he hoped she had not signed a card as she would be jeopardizing her job to do so. Corlew further testified that the following month, after the Union had voted to strike, Reinack on various occasions asked her "if we were planning to walk out that particular day or when we were planning to walk out, or if this was the time we were going to do this." According to employee Annette Joiner, after the strike had started, Reinack asked her "in a kidding way" when and where the next union meeting was to be.

Reinack, admitting that he "might have" asked Corlew whether she had attended a union meeting, denied the other statements attributed to him. Based on my observations of the witnesses, I credit the testimony of Corlew and Joiner.

(2) Alleged supervisory status of Montero, Clark, and Reinack

Shirley Montero, the head night cashier, performed duties substantially similar to those of Jane Myette, the head day cashier, who all parties agree is not a supervisor. The only appreciable difference appears to be that Montero has the authority to tell the women employees at night when to take their "coffee breaks," and allows them from 12 to 15 minutes. This added responsibility and discretion do not, in my judgment, lead to a determination that Montero is a supervisor and Myette is not. I therefore find that Montero is not a supervisory employee.

Reinack and Clark were "management-trainees" or "department heads," a classification common to the various Clark's stores involved in this litigation. Such an employee is hired as a potential store manager, although many of them leave the Company before attaining such status. He is in charge of a department within the store and is thus "trained on the job" for his potential managership. As a "department head" he has no power to hire or fire, but he does give directions to the other clerk or clerks in the deparement, who are aware of his status as "head" and as "manager-trainee." Usually such manager-trainees are salaried, rather than hourly paid, and are carried on the "New York payroll" rather than that of the store in which they are working. Their position as known potential managers tends to separate their interests from those of ordinary rank-and-file employees, and in any event as "department heads" they are cloaked with authority to direct the other clerks in the discharge of their duties. Such direction is minimal in the case of a discount department store, but I find it sufficient to establish that in the ordinary case department heads

are supervisors. Further, as management-trainees they are regarded by employees as representing company policy, and their statements are properly attributable to the Company. See *International Association of Machinists, Tool and Die Makers Lodge No. 35 (Serrick Corp.)* v. *N.L.R.B.*, 311 U.S. 72, 80; *H. J. Heinz Company* v. *N.L.R.B.*, 311 U.S. 514, 520; *N.L.R.B.* v. *Fiore Bros. Oil Co. & Amalgamated Union Local 355*, 317 F.2d 710 (C.A. 2).

d. *Conclusions with respect to the alleged violations of Section 8(a)(1) at Glens Falls*

Summarizing the foregoing discussion, I find that the Company violated Section 8(a)(1) of the Act by the following acts: (1) Store Manager Dunne's and Guard Supervisor Godfrey's intimidatory treatment of Noonan; (2) Assistant Store Manager Eastman's directive to Joiner not to talk to organizers; (3) Godfrey's statement to employee Morehouse in employee Myette's presence that Dunne had the names of the employees who had signed union cards;[16] (4) department head Reinack's conversation with Corlew in which he asked if she had attended a union meeting and told her that she would be jeopardizing her job if she signed a union card; (5) the statement of store guard Williams to employee Joiner that "things will tighten up" if the Union came in; and (6) Willims' warning to Palmer not to talk to union organizers. Although Williams was a mere store guard,

[16] Godfrey was "laughing" when he told Morehouse to turn in to him the names of new card signers and "smiling" when he said Dunne had a list of those who had already signed. Myette thought he meant the latter statement to be taken seriously. I find it an unlawful statement even if uttered with a smile. *N.L.R.B.* v. *A. P. Green Fire Brick Company*, 326 F.2d 910, 914 (C.A. 8).

not a supervisor, he had been instructed to "keep an eye" on organizers, and his statements may well have been prompted by what he regarded as the natural implication of his instructions. Under these circumstances the Company is liable for his conduct under the doctrine of *National Paper Company*, 102 NLRB 1569, 1571-72, set aside 216 F.2d 859, 868 (C.A. 5);[17] see also Restatement (Second) *Agency*, §§ 230-231 (1938).

I find no violation of Section 8(a)(1) in Osborne's isolated query of Clark, in the alleged "surveillance" by the police officers, in Montero's inquiry of Doran (Montero not being a supervisor), or in Clark's conversation with French. Godfrey's suggestion that the employees act as a group without the Union was nothing but a personal expression of his own, expressed in friendly, informal conversation with two strong supporters of the Union, who immediately and unequivocally rejected Godfrey's suggestion. In the light of all these circumstances I find that this isolated reference to the formation of an employee group apart from the Union did not violate the Act.

Having found only isolated violations of Section 8(a)(1), I conclude that here as in the Springfield, Ohio, case, discussed above, the unfair labor practices are not sufficient to invoke the *Joy Silk* doctrine, and that a bargaining order is not called for here to remedy the 8(a)(1) violations. I should add that I would reach the same result, even if I am in error in

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[17] In declining to enforce the Board's Order in *National Paper*, the Court observed that the guard in that case was employed by an independent contractor and had acted in direct violation of express orders of his own employer. Williams in the instant case was employed directly by the Company and was not violating express orders.

finding the two-store unit inappropriate, and even if Godfrey's suggestion that the employees act in concert without the Union be held an unfair labor practice.

* * * *

Conclusions of Law

1. Respondent [21] at its Springfield, Ohio, store, by hard goods manager Burkhardt's request of employee Wallace that she speak against the Union; by department head Thomas' interrogation of employee Gounara as to her union views, and by the granting of a wage increase to Gounara for the purpose of discouraging support of the Union, has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. Respondent at its Glens Falls, New York, store, by Manager Dunne's and Guard Supervisor Godfrey's intimidatory treatment of employee Noonan, by Assistant Manager Eastman's directive to employee Joiner not to talk to organizers, by Godfrey's statement to employees that Dunne had a list of those who had joined the Union, by department head Reinack's interrogation of, and warning to, employee Corlew, and by store guard Williams' threats to employees Joiner and Palmer has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. Except as found in the two foregoing conclusions, Respondents have not engaged in the unfair labor practices alleged in the complaint.

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[21] For purposes of these conclusions, the term "respondent" applies to the corporate entity operating the particular store involved in the particular conclusion of law.

The Remedy

I shall recommend that the appropriate Respondents be directed to cease and desist from their unfair labor practices and that they post appropriate notices of compliance.

Accordingly, upon the foregoing findings and conclusions, and upon the entire record, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

ORDER

I. Clark's Gamble Corporation d/b/a Clark's Discount Department Store (as successor to Clark's Springfield, Inc., Clark's Gamble Springfield, Inc., and Clark's Landau Springfield, Inc.), its officers, agents, successors, and assigns, shall:

A. Cease and desist from asking employees to speak against union organization, interrogating employees as to their union views, promising or granting wage increases to discourage union activity, or in any other manner interfering with, restraining, or coercing its employees (including employees in leased departments) in the exercise of their rights under Section 7 of the Act.

B. Take the following affirmative action necessary to effectuate the policies of the Act:

1. Post at its store in Springfield, Ohio, copies of the attached notice marked "Appendix A." [22] Copies

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[22] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for "the Recommended Order of a Trail Examiner" in the notice. In the further event that the Board's Order be enforced by a United States Court of Appeals the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order."

of such notice, to be furnished by the Regional Director for Region 9, shall, after being duly signed by an authorized representative of the Company, be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

2. Notify the Regional Director for Region 9, in writing, within 20 days from the date of the receipt of this Decision, what steps the Company has taken to comply herewith.[23]

II. Respondent M. N. Landau Stores, Inc., d/b/a Clark's Stores, its officers, agents, successors, and assigns, shall:

A. Cease and desist at its Glens Falls, New York, store from intimidating employees because they conversed with union organizers, forbidding employees from conversing with organizers, advising employees that it has a list of employees who have signed union cards, interrogating employees as to their union activity, threatening employees that by signing a union card they jeopardize their jobs, or in any other manner interfering with, restraining, or coercing its Glens Falls employees (including employees in leased departments) in the exercise of their rights under Section 7 of the Act.

B. Take the following affirmative action necessary to effectuate the policies of the Act:

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[23] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read, "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Company has taken to comply herewith."

1. Post at its store in Glens Falls, New York, copies of the attached notice marked "Appendix B."[24] Copies of such notice, to be furnished by the Regional Director for Region 3, shall, after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

2. Notify the Regional Director for Region 3, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.[25]

Dated at Washington, D.C.

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[24] See footnote 22, *supra*.

[25] See footnote 23, *supra*.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the Recomended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

All our employees have the right to join or assist Local Union No. 1552, Retail Clerks International Union, AFL-CIO, or any other union, and also have the right not to join or assist any union.

WE WILL NOT question our employees as to their union activity, promise or grant benefits for the purpose of discouraging union activity, ask employees to speak for or against any union, or in any other manner interfere with their exercise of the above rights.

CLARK'S GAMBLE CORPORATION d/b/a
CLARK'S DISCOUNT DEPARTMENT STORE
Employer

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407 Federal Office Building, 550 Main Street, Cincinnati, Ohio, 45202, Telephone No. 684-3686.

APPENDIX B

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

All our employees have the right to join or assist Local 1262, Retail Clerks International Association AFL-CIO, or any other union and also have the right not to join or assist any union.

WE WILL NOT question our employees as to their union views, forbid them from talking to union organizers during nonworking hours, maintain a list of employees who sign union cards, advise employees that by signing union cards they jeopardize their employment, or in any other manner interfere with their exercise of the above rights.

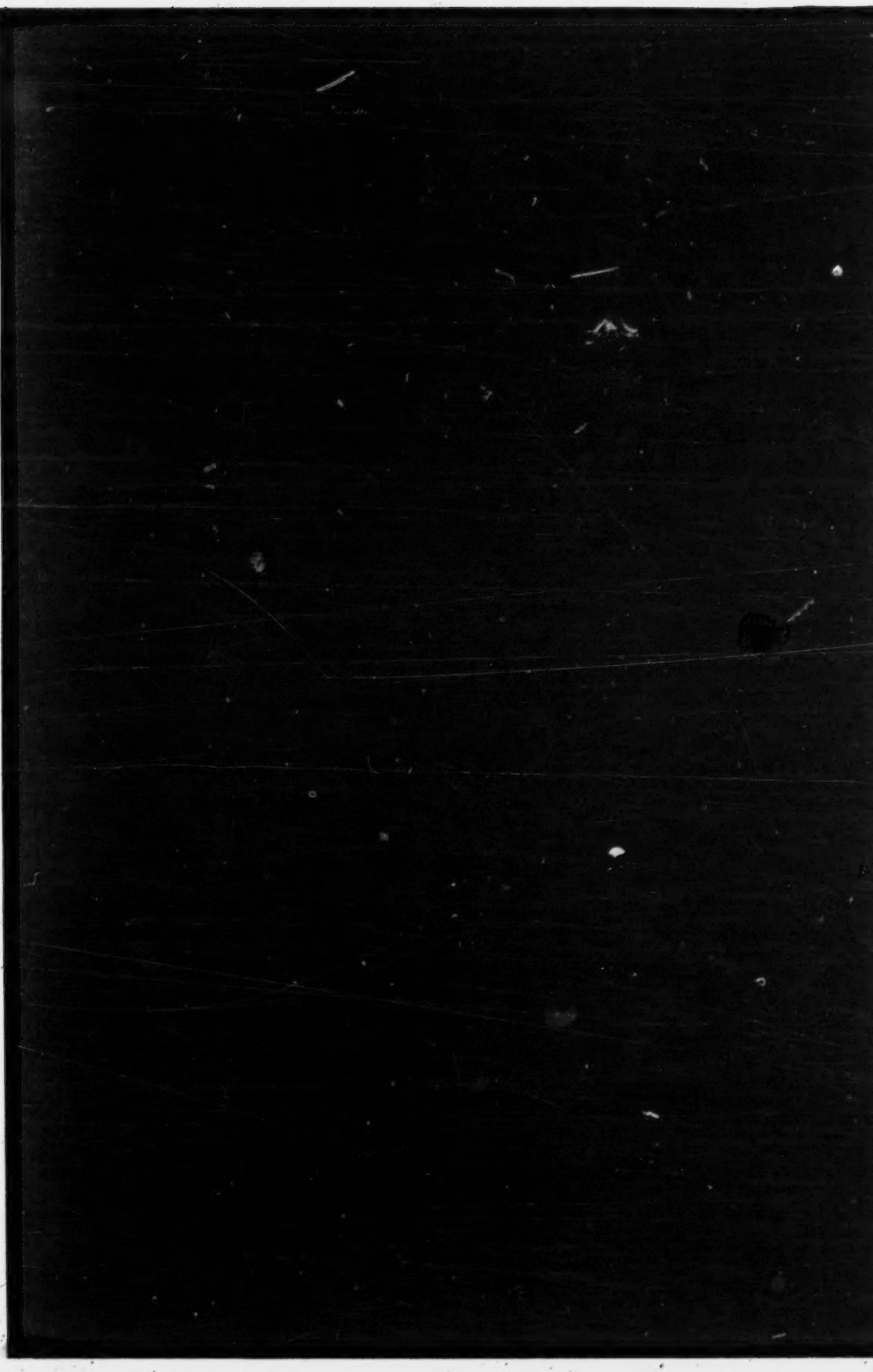
M. N. LANDAU STORES d/b/a
CLARK'S STORES
Employer

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, The 120 Building, 120 Delaware Avenue, Buffalo, New York, 14202, Telephone No. 842-3100.

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SUPREME COURT, U. S.
FILED
SEP 19 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 439

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CLARK'S GAMBLE CORPORATION D/B/A CLARK'S DISCOUNT DEPARTMENT STORE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR M. N. LANDAU STORES, INC. IN OPPOSITION

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September, 1969.

The Daily Record Co., Baltimore, Md. 21203

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IN THE

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NATIONAL LABOR RELATIONS BOARD,
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CLARK'S GAMBLE CORPORATION D/B/A CLARK'S DISCOUNT DEPARTMENT STORE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR M. N. LANDAU STORES, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App. 13-17)[1] is reported at 407 F. 2d 199. The decision and order of the Board (App. 20-62) are reported at 168 NLRB No. 43.

JURISDICTION

The decree of the court of appeals (App. 18) was entered on February 11, 1969. The Board's petition for rehearing

[1] "App." refers to the Appendix to the petition, which appears at pp. 13-62 of the petition. "J.A." refers to the portions of the record printed as a Joint Appendix in the court below.

en banc was denied on March 26, 1969 (App. 19). On June 16, 1969, Mr. Justice Stewart granted an extension of time for filing the petition to and including August 8, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit was correct in denying enforcement of the National Labor Relations Board's bargaining order.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (161 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

STATEMENT

On December 22, 1964, Local 1262, Retail Clerks International Association, AFL-CIO,[2] claiming to represent a majority of employees at two stores owned by M. N. Landau Stores, Inc.[3] and located at Glens Falls and Saratoga Springs, New York, made a demand on the Company for recognition and bargaining (App. 26-36; J.A. 49a, 57a). That same day the Company expressed a good faith doubt in the Union's claim and suggested that the Union seek a Board election (App. 47-48; J.A. 27a). When the Union did not do so, the Company filed a petition for an election with the Board (App. 47-48; J.A. 27a). That petition was

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[2] Hereinafter referred to as the "Union".

[3] Hereinafter referred to as the "Company".

dismissed by the Board's Regional Director upon the issuance of the complaint herein on September 23, 1965 (App. 46, 48; J.A. 27a). The charge which originated this complaint had been filed by the Union on January 7, 1965 (App. 46; J.A. 26a).

After a hearing, a decision on the complaint was issued on December 30, 1966, by the Board's Trial Examiner who found that the Union's bargaining demand had been made in an inappropriate two-store unit, but who went on to consider "whether the Company committed unfair labor practices of such a nature as to render appropriate the issuance of a bargaining order" in the Glens Falls store alone (App. 48; J.A. 28a). The Trial Examiner found violations of Section 8(a)(1) which involved only six of the 77 employees in the store (App. 55, 36; J.A. 34a, 57a). He dismissed allegations of several other unfair labor practices.

The Trial Examiner then considered the proper remedy for the unfair labor practices found and concluded:

> Having found only isolated violations of Section 8(a)(1), I conclude that . . . the unfair labor practices are not sufficient to invoke the *Joy Silk* doctrine, and that a bargaining order is not called for here to remedy the 8(a)(1) violations (App. 56; J.A. 35a).

Almost one year later, on November 16, 1967, the Board issued its decision and order reversing the Trial Examiner on the allegations of Section 8(a)(1) violations in which he had found no merit (App. 22-26; J.A. 46a-49a), and ordering bargaining as a remedy for the 8(a)(1) unfair labor practices (App. 37; J.A. 58a).

The four additional unfair labor practices found by the Board included a finding that store guards, who were also city police officers, kept a Union meeting under surveillance

(App. 22-23; J.A. 46a-47a). This meeting was held in a building located only a few doors from the main intersection in Glens Falls, the location to which the police officers were routinely assigned (App. 51; J.A. 30a). The Trial Examiner had found:

> Both men testified that at the times in question they were discharging routine duties as police officers of Glens Falls, and there is no affirmative evidence that they were told to spy on the employees or that they reported to management the names of any employees attending the meeting (App. 51; J.A. 30a).

A second violation found by the Board involved a conversation between a supervisor and two strong Union supporters which the Trial Examiner characterized as "friendly" and "informal" as well as "isolated" (App. 56; J.A. 35a). The two other violations found by the Board involved only two employees. Supervisor Clark asked an employee whether she was going to run to the Union (App. 53; J.A. 32a); and Sylvia Montero, whom the Trial Examiner found was not a supervisor (App. 54; J.A. 33a), asked an employee if anyone from the Union has been around recently (App. 53; J.A. 32a).

The United States Court of Appeals for the Sixth Circuit affirmed the Board's 8(a)(1) findings as supported by substantial evidence while expressing the opinion that, "were it our function to reach an independent determination on the basis of the record it is probably that it would be at variance . . ." (App. 15). However, the court declined to enforce the Board's bargaining order because of the probability of extensive turnover during the thirty-four month hiatus between the original unfair labor practice charge and the issuance of the Board's order, and remanded the case for a determination of "the extent to which there has been a change in the identity of the employees since the time demand for recognition was made" (App. 16-17).

ARGUMENT

1. The Sixth Circuit's refusal to enforce the Board's bargaining order in the instant case was uniquely appropriate. The court observed that the turnover in retail personnel is frequent (App. 16). Enforcement of the Board's order now might impose collective bargaining on a group of employees who never authorized such representation. This would constitute a violation of the Section 7 rights of the new employees to be represented by a labor organization of their own choice or to refrain from such representation. Certainly at this late date, some five years after the organizing campaign, the effect of the unfair labor practices alleged in this case have been dissipated and a fair election, which would protect those rights, is possible.

Petitioner's reliance on *National Labor Relations Board v. Gissel Packing Co., et al.*, Nos. 573, 691, 585, O.T., 1968, decided June 16, 1969, and the cases cited therein, is misplaced. In those cases the Court's rationale was based on the possibility of an employer using dilatory tactics designed to put off indefinitely the obligation to bargain. In the instant matter however the Company, at the outset, filed a petition for an election (App. 47-48; J.A. 27a), and it was the leisurely processes of the Board which caused a three-year delay between the issuance of a complaint and the Board's decision and order. This extraordinary passage of time caused the Sixth Circuit not to deny the Board's order out of hand, but to remand the case to the Board so that it might "determine the extent to which there has been a change in the identity of the employees since the time demand for recognition was made" (App. 17). The Sixth Circuit is thus not saying that employee allegiances may have wavered, the argument considered by the court in *Gissel*, but that the identity of the entire work force may have changed.

2. In any event, the Board's bargaining order in the instant case is not appropriate:

> Under the Gissel holding a bargaining order may issue where: (a) the union had valid authorization cards from a majority of the employees in a bargaining unit; (b) the employer's unfair labor practices although not "outrageous" and "pervasive" enough to justify a bargaining order in the absence of a card majority, were still serious and extensive; (c) "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight"; and (d) employee sentiment can best be protected in the particular case by a bargaining order.

N.L.R.B. v. American Cable Systems, Inc., No. 25358, decided July 18, 1969, 71 LRRM 2979, 2984 (C.A. 5); *Food State Employees Union, Local 347 v. N.L.R.B.*, Nos. 21809 and 21921, decided July 18, 1969, 71 LRRM 3004 (C.A.D.C.). The Board's Trial Examiner decided that because of the "isolated" nature of the Section 8(a)(1) violations a bargaining order was not warranted (App. 56). The Board then reversed its Trial Examiner and issued its order because of the additional unfair labor practices found (App. 37). However, the additional violations found by the Board, aside from the alleged surveillance set forth above, involved only four employees out of 77. This can hardly be said to transform "isolated" violations into a basis for a bargaining order. None of the violations alleged were the "flagrant kind." *N.L.R.B. v. Ben Duthler, Inc.*, 395 F. 2d 28, 34 (C.A. 6). The opinion of the Sixth Circuit in *Ben Duthler* applies to the present case equally as well.

> No employees were discharged; no threats were made of moving the stores or closing the stores; and no employee was repeatedly or directly threatened by the employer or supervisory personnel. The statements of the employer and supervisory personnel that were

> found to be violations were the borderline type of statements between legitimate comment and "veiled threats", where the courts generally defer to the expertise of the Board but where the coercive effect on the employee is slight. Any lingering effect of these actions of [the employer] should be completely dissipated by the usual postings required by the Board. So in a re-run election Duthler will not benefit from any past violations.

Id. at 34.

Indeed, the Board has in many cases *refused* to issue a bargaining order where the unfair labor practices found were less innocuous and involved as few employees as the case at hand: *Union Carbide Corporation*, 166 NLRB No. 39 (extensive interrogation of employees concerning union sympathies and activities, creating the impression of surveillance, transferring a known union adherent from one job to a less desirable job, discriminatorily issuing reprimands); *Merritt Packing and Crating Service, Inc.*, 172 NLRB No. 202 (interrogation, creating the impression of surveillance, threatening employees with new requirements and restrictions, violating Section 8(a)(3) of the Act by implementing threatened restrictions); *Clermont's, Inc.*, 154 NLRB 1397 ("serious violations of 8(a)(1)" including coercive speeches, coercive statements, illegal surveillance). Furthermore, the courts have refused to enforce Board bargaining orders in circumstances, such as these, where not warranted by the severity of the unfair labor practices. "A bargaining order . . . is strong medicine." *N.L.R.B. v. Flomatic Corp.*, 347 F. 2d 74, 78 (C.A. 2); *N.L.R.B. v. Ben Duthler, Inc., supra.*

3. If the Court is of the opinion that the rationale applied by the Sixth Circuit is in conflict with *Gissel*, this matter should be remanded for reconsideration in view of the Court's opinion in *Gissel*. This would ensure proper judi-

cial review of the Board's bargaining order under the standards set by this Court. Although under Section 10(c) of the Act the Board is empowered to fashion remedial orders,

> the Board's action is not insulated from judicial review where it has applied "a remedy it has worked out on the basis of its experience, without regard to circumstances which make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act."

N.L.R.B. v. Flomatic Corp., supra at 77; citing *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 349; *Local 60, United Bhd. of Carpenters, etc. v. N.L.R.B.*, 365 U.S. 651; *Consolidated Edison Co., etc. v. N.L.R.B.*, 305 U.S. 197. A remand for reconsideration would allow the Sixth Circuit to consider the propriety of the Board's order in contemplation of *Gissel* and in light of all the surrounding circumstances.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1969.

SUPREME COURT OF THE UNITED STATES

October Term, 1969

NATIONAL LABOR RELATIONS BOARD *v.* CLARK'S GAMBLE CORP., ETC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 439. Decided November 10, 1969

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *National Labor Relations Board* v. *Gissel Packing Co., Inc.*, 395 U. S. 575.

MR. JUSTICE DOUGLAS dissents.